



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Paul Hughes

v

Converge International Pty Ltd
(U2023/5454)

DEPUTY PRESIDENT EASTON

SYDNEY, 14 NOVEMBER 2023

Application for relief from unfair dismissal – jurisdictional objection – high income threshold – a person protected from unfair dismissal – covered by a modern award – principal purpose test – evidentiary onus – the applicant’s employment was covered by a modern award – jurisdictional objection dismissed – applicant’s unfair dismissal claim to proceed.

[1] On 19 June 2023 Mr Paul Hughes made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) for a remedy, alleging that he had been unfairly dismissed from his employment with Converge International Pty Ltd.

[2] At the time of his dismissal Mr Hughes was employed as the General Manager Customer Relationships and his salary was \$165,000 plus a bonus of up to 20% of the base salary.

[3] Converge International Pty Ltd (**Converge**) argued that Mr Hughes was not “a person [who] is protected from unfair dismissal” within the meaning of s.382 of the *Fair Work Act 2009* (Cth) (**the Act**) because his earnings place him above the high income threshold (see s.333). At the time of Mr Hughes’ dismissal the high income threshold was \$162,000.

[4] Mr Hughes agreed that his earnings were more than the high income threshold but argued that the *Health Professionals and Support Services Award 2020* (**the Health Award**) covered his employment.

[5] Mr Hughes’ standing to make his application was heard as a threshold issue. If Mr Hughes’ employment is covered by Health Award then his unfair dismissal claim can proceed. If not, then Mr Hughes’ application must be dismissed.

[6] In this decision I have:

- (a) considered the applicable principles;
- (b) considered the question of evidentiary onus;
- (c) reviewed the evidence of the nature of Mr Hughes' work and the circumstances in which Mr Hughes was employed to do the work;
- (d) ascertained the principal purpose for which Mr Hughes was employed; and
- (e) compared the principal purpose to the classification descriptor in order to determine whether it falls within the scope of that descriptor.

[7] Both Mr Hughes and Converge were represented pursuant to leave granted under s.596 of the FW Act. Mr Patrick Mullaly appeared for Mr Hughes and Mr James Hooper of Counsel appeared for Converge.

Principal Purpose Test

[8] In deciding whether a modern award covers an employee's employment the Commission applies a 'principal purpose test.' In *Zheng v Poten & Partners (Australia) Pty Ltd* [2021] FWC 3478 at [47], (2021) 307 IR 339 at 359 (**Zheng**) the Full bench summarised the test as follows:

“It remains necessary to consider what the application of the “principal purpose” test requires. As was stated in [*Carpenter v Corona Manufacturing Pty Ltd* (2002) 122 IR 387], the test requires an examination of the nature of the work of the employee in question and the circumstances in which the employee is employed to do the work for the purpose of ascertaining the principal purpose for which the employee is employed. This is a question of fact. Once that is done, the principal purpose as identified must be compared to the classification descriptor in order to determine whether it falls within the scope of that descriptor. Thus, in [*Brand v APIR Systems Ltd* (unreported, AIRC (FB), [PR938031](#), 16 September 2003)] the approach taken by the member at first instance and endorsed by the Full Bench on appeal was to identify the principal purpose of the relevant employee's employment as being that of “the development of the business of the company including business planning marketing and sales planning manager”, and then to determine that this did not fit within the Level 4 classification descriptor.

[9] In *Carpenter v Corona Manufacturing Pty Ltd* (2002) 122 IR 387 (**Carpenter**) the appellant was employed as the National Sales Manager. The Full Bench found that the appellant's duties were principally managerial in nature and that sales activities formed only a minor part of the work he was required to perform. The Full Bench said at [9]:

“[9] In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed. In this case, such an examination demonstrates that the principal purpose for which the appellant was employed was that of a manager. As such, he was not “employed in the process, trade, business or occupation of ... soliciting orders, obtaining sales leads or appointments or

otherwise promoting sales for articles, wares, merchandise or materials’ and was not, therefore, covered by the Award.”

[10] It is helpful to also note that in determining award coverage it is the duties performed by an employee that are significant, rather than the title of their position. As Deputy President Gostencnik said in *Kaufmann v Jones Lang LaSalle (Vic) Pty Ltd* [2017] FWC 2623 (**Kaufmann**):

“[45] I agree with the Applicant’s submission that put simply, the principal purpose of the Applicant’s position was to sell real estate. Some of the transactions involved were of higher value and greater complexity than those involved in, say a suburban residential real estate agency, but the true nature of the work being performed is much the same. The Applicant had little role in the strategy and management of the Respondent. He had no direct reports. His title, of Regional Director, was effectively a rank or accolade accorded by the Respondent, but the question of award coverage is not determined by the person’s title – it is the duties performed that will be of significance.”

[11] Deputy President Gostencnik’s reasoning was endorsed by the Full Bench in *BHP Coal Pty Ltd v CFMMEU* [2021] FWCFB 197 at [31].

Evidentiary Onus

[12] During closing submissions it became apparent that the parties did not agree about who carried the evidentiary onus in relation to Converge’s jurisdictional objection. As a result the parties provided supplementary written submissions after the conclusion of the hearing.

[13] The Full Bench in *Teterin v Resource Pacific Pty Ltd* [2014] FWCFB 4125 at [23]-[29], (2014) 244 IR 252 at 261-263 explored the question of onus in some detail. The Full Bench accepted that the notion of an *onus of proof* imports legal doctrines that should have no part in the Commission’s procedural or decisional process (at [23]). The Full Bench noted that the *evidentiary onus*, being “the burden of adducing or pointing to sufficient evidence to raise an issue for determination by the court”, is borne by the party bearing the risk of non-persuasion as to the fact in issue (at [25]-[29]).

[14] Mr Hughes submitted that a party asserting a certain outcome carries the onus of proving that on the balance of probabilities, citing *Dickinson v Minister of Pensions* (1953) 1 QB 228 at 232. Mr Hughes submitted that Converge carries the evidentiary onus to “adduce evidence to make a s.382 objection a live issue”, referring to the High Court’s observation in *Sidhu v Van Dyke* [2014] HCA 19 at [63], (2014) 251 CLR 505 at 524.

[15] Converge argued that the outcome of the jurisdictional objection can be fatal for Mr Hughes but not for Converge, and so Mr Hughes bears the risk of failure and therefore the evidentiary onus. Converge argued that because Mr Hughes earned more than the high income threshold he “would usually be barred from bringing an unfair dismissal claim” and that Mr Hughes has “the benefit of the exception to this rule by virtue of being Award covered.”

[16] In my view applicants carry the evidentiary onus to provide a sufficient basis upon which the Commission can be satisfied that they are “a person [who] is protected from unfair dismissal”.

[17] Section 382 is in the following terms:

“382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.”

[18] A person is protected from unfair dismissal if both limbs of s.382 are satisfied. The person must have completed the minimum employment period (s.382(a)) and at least one of the three circumstances in s.382(b) must apply. Mr Hughes carries the risk of failure if the Commission does not find that both limbs are satisfied.

[19] I do not accept Mr Hughes’ proposition that because Converge has raised a jurisdictional objection it therefore carries the onus of providing sufficient evidence to establish its objection. If Mr Hughes’ proposition is correct then applicants only bear an evidentiary onus if the respondent stays silent and does not raise a jurisdictional objection.

[20] I do not agree with Converge’s characterisation that award coverage is an exception to rule. I accept that there is a greater likelihood that an employee earning more than the high income threshold is not covered by a modern award or an enterprise agreement, but that is a matter of coincidence rather than causation.

Mr Hughes’ Evidence

[21] Converge provides “evidenced-based holistic employee assistance programs” to a wide range of organisations from a vast array of industries to help their clients have a more engaged, productive, healthy and safe workforce. Converge accesses a large network of mental health professionals to provide services to its clients.

[22] Mr Hughes is not a mental health professional. Mr Hughes commenced employment with Converge as a Client Relationship Manager on 16 November 2016. In relation to his employment Mr Hughes said:

“The Terms and Conditions of the employment contract have remained in place throughout my employment, notwithstanding several changes of the name of my role and an increase in salary.

At the time of interview for the role I was provided with an outline of my duties should I be appointed. Essentially, I was responsible for a portfolio of ACT and NSW customer contracts.

At the time of my dismissal my role was described as General Manager Customer Relationships. My title had changed a couple of times since my appointment.”

[23] Mr Hughes reported to the Executive Director Customer Relationships.

[24] Mr Hughes said that his principal role was to ensure that all customers within his area of responsibility were retained, supported and increased in line with company growth strategy for each customer. He said it his role was a very intensive ‘hands-on’ role.

[25] Mr Hughes said that there were thirteen customer relationship managers (**CRM**) in the organisation and that his portfolio of clients was the fourth largest portfolio. Three of Mr Hughes’ clients were in Converge’s top six. Mr Hughes referred specifically to two clients in his portfolio that were both in Converge’s top ten customers. One client he described as “a very demanding and time-consuming customer. I would regularly have to respond to out of hours calls and emails from the customer because we had not been able to provide on-site support to particular critical incident events.” Mr Hughes said the other client was “administratively busy [because] for every new request for training, workshops, seminars or presentations, I had to write a detailed quote for each one.”

[26] Mr Hughes described the daily, weekly and monthly activities he performed:

“Daily

- a. Up to 8 customer or internal meetings per day via Teams
- b. Review and respond to around 150 emails
- c. Video meetings via Teams and Telephone calls with customers typically between 6 and 10 per day on anything from discussing their new requirements, providing advice on mental health and wellbeing for their employees, follow up on actions
- d. Approx 1 to 2 hours per day dealing with [one particular client’s] customer issues and enquiries
- e. Dealing with customer complaints via telephone and email
- f. Providing support and guidance to the team with their questions and queries

Weekly

- a. Managing my personal portfolio of customers
- b. Conduct 121 meetings with team members
- c. Attend whole of customer team meeting
- d. 121 meeting with my line manager
- e. Coordinating and allocating work to the team as required
- f. Following up on complaint investigations, reviewing findings then writing responses back to customers
- g. Escalation point for several large complex customers including
- h. Review/writing tender responses
- i. Draft and review pricing calculations for all quotes and tenders
- j. Draft PowerPoint presentations for tender pitches
- k. Inputting customer details, sales updates for new opportunities, leads, closing sales
- l. Writing quotes and proposals for customers
- m. Presenting EAP Awareness sessions to customers either via video link or face to face
- n. Reviewing customer contracts and provide advice on contract exceptions/variations that Converge would agree/not agree to
- o. Typing up action points from meetings with customers along with reviewing work from team members
- p. Video calls meetings with internal colleagues trying to resolve invoice/finance issues for customers, chasing and following up on training quotes/proposal for customers that were outstanding
- q. Interpreting the data in customer Power BI reports around their EAP program utilisation including trend analysis and making recommendations on potential areas to focus on
- r. Recently implementing a new key customer over 3 months

Monthly

- a. Attending Leadership Team meeting in Melbourne
- b. Review monthly sales through pulling multiple reports from Salesforce as well as liaising with the finance team
- c. Attend monthly Health and Safety meeting as I was the Sydney office representative
- d. Drafting and updating Customer Strategic Account Plans”

[27] In cross-examination Mr Hughes said:

- (a) his title at one stage was General Manager, Government Health And Education;
- (b) eight positions reported to him – five senior client relationship managers and three client relationship managers;
- (c) he was in contact with each of these eight managers at least weekly;
- (d) he attended Business Leadership Team (**BLT**) meetings although he was not a member of the BLT. The BLT met weekly on Monday mornings and he only attended BLT monthly meetings;
- (e) it was his idea, in conjunction with others, to establish an emergency services sector within Converge’s organisation to target business;
- (f) each morning he met with his direct manager for 30 minutes. Approximately once or twice per fortnight information was discussed that could be described as strategic or highly confidential;

- (g) in recruitment for new customer relationship managers he was involved in the first shortlisting of candidates. He interviewed candidates and made recommendations for some to progress to a second interview but he did not make hiring decisions;
- (h) he was “deeply invested” in growing and developing his CRM team;
- (i) he did not identify new talent to bring into the business;
- (j) he was involved in a performance management process;
- (k) he did not ever make a decision to terminate anyone’s employment, but he did have a role in coaching and performance managing people in conjunction with more senior managers;
- (l) his manager made decisions about terminating the employment of other workers; and
- (m) he worked in a coaching capacity for other CRMs.

Respondent’s Evidence

[28] Mr Paul Gretton-Watson worked for Converge as the Executive Director of Customer Relationships until November 2022. In this role he was Mr Hughes’ direct line manager.

[29] In his witness statement Mr Gretton-Watson described Mr Hughes’ duties by reference to a Job Description dated February 2023. There are at least two problems with the February 2023 Job Description: it appears to be a document prepared after Mr Gretton-Watson stopped managing Mr Hughes and there is no evidence that the document was ever provided to Mr Hughes. I have nonetheless considered Mr Gretton-Watson’s evidence as direct evidence of Mr Hughes’ duties during the time Mr Hughes reported to him.

[30] In his written statement Mr Gretton-Watson said that Mr Hughes:

- (a) was a member of the BLT and he “participated in strategic whole of company discussions and was privy to confidential business information”;
- (b) had a leading role in contributing to strategic planning with a focus on government, health and education;
- (c) invested deeply in growing and developing his junior CRM team; and
- (d) headed up the largest portfolio of customers (referring to the portfolio that he and the other CRMs under him managed).

[31] Mr Gretton-Watson provided what he said were examples of Mr Hughes “driving the business as a senior manager”:

- (a) he was instrumental in setting and driving the sales incentive plan for the CRM team;
- (b) he managed some of the more complex and exacting customers within his portfolio;
- (c) he was diligent in attending daily meetings with Mr Gretton-Watson; and
- (d) he provided feedback on the customer pricing calculator.

[32] In cross-examination Mr Gretton-Watson said:

- (a) the February 2023 Job Description was provided to him by another staff member in the course of preparing the evidence in this case, and that he had not seen the document prior to Mr Hughes’ dismissal;
- (b) Mr Hughes made requests for new roles to be created. His requests were considered by People, Culture and Learning and by the Chief Financial Officer;
- (c) he and Mr Hughes often spoke about who they might want to approach in the market for employment;

- (d) Mr Hughes conducted recruitment interviews and put forward a final preferred candidate;
- (e) Mr Hughes was not a “full member” of the BLT but he was invited to monthly (but not weekly) meetings;
- (f) the elements of Mr Hughes description of his daily, weekly and monthly duties (see paragraph [26] above) are “probably accurate” but that he was not so sure about the “quantum” of some items listed;
- (g) in Mr Hughes’ annual performance review in August 2022 Mr Gretton-Watson commented on Mr Hughes direct performance by reference to sales revenue for Mr Hughes’ portfolio, customer satisfaction, stability and motivation of his team, team dynamics amongst other items. These matters, in combination with the duties identified in Mr Gretton-Watson’s witness statement, were the principal purposes of Mr Hughes’ employment;
- (h) the focus of Mr Hughes’ role was to grow and develop the government health and education portfolio of the Converge business base which was approximately 60% - 65% of total revenue and to steward that part of the business and continue to grow it in line with the strategic goals and EBIT expectations;
- (i) this focus cascaded down to a range of daily general manager-level responsibilities, some of which he felt were not captured fully in Mr Hughes’ description of his role; and
- (j) he met with Mr Hughes every morning at 8:30am to talk about a mixture of operational matters and strategic matters and to plan the day and get on top of what was going on across the business.

[33] Ms Jade Nicholson gave evidence for Converge. Ms Nicholson was the National Development Manager from December 2021 to February or April 2023 and has been the Executive Director of Customer Relations for Converge since then.

[34] In her witness statement Ms Nicholson said:

- (a) as Mr Hughes’ line manager (from February or April 2023 to his dismissal on 31 May 2023) there are innumerable examples of how senior his role was, as he was in the role for significant period of time and his day-to-day function involved senior tasks, a senior level of autonomy, reliance by the company on him to exercise his discretion around recruiting and exiting staff in line with company policies and processes, delegations of work, expenditure related to the Customer Relationships function; and
- (b) the examples of his seniority are that he was responsible for key recruitment decisions for four client relationship managers, that he attended monthly BLT meetings, he was privy to confidential financial documents and he drove “strategic initiatives for elevated customer engagement”.

[35] In cross-examination Ms Nicholson said:

- (a) when she assumed the role of Mr Hughes’ line manager she did not review his position description or his contract of employment; and
- (b) the elements of Mr Hughes description of his daily, weekly and monthly duties (see paragraph [26] above) are the core responsibilities of Mr Hughes’ role in conjunction with the key accountabilities listed on the Position Description(s).

[36] Ms Jennifer George is Converge's Chief Executive Officer. Ms George's description of Mr Hughes' duties reflected, like the other witnesses, the terms of the position descriptions for his role. Ms George described Mr Hughes as a member of the senior management team because his role involved, amongst other things:

- (a) deciding whether to tender for particular work;
- (b) acquiring and managing customer accounts;
- (c) managing people in the customer relationship team included responsibility for setting a culture within the team;
- (d) being part of the group that oversaw the sales incentive program; and
- (e) contributions to company strategy.

[37] In cross-examination Ms George said:

- (a) the value of approximately 90% of customer contracts are within Mr Hughes' delegated authority to sign;
- (b) Mr Hughes was not a member of the BLT but attended monthly meetings; and
- (c) nobody within Converge has the authority to hire new staff of their own volition.

Position Descriptions

[38] There was disagreement in the evidence about the position description(s) said to be attached to Mr Hughes' roles. Converge relied on a position description dated February 2023 as the foundation for its witness evidence, and then also tendered another position description dated July 2020 during the hearing. When cross-examined Mr Hughes denied that he had seen either document.

[39] Converge led no evidence that established that Mr Hughes had received either document. Ms Nicholson was not confident in her recollection of when she first saw the February 2023 position description. She certainly did not have any recollection of requesting or creating such a document in February 2023, or providing such a document to Mr Hughes at or around this time.

[40] In August 2020 Mr Hughes applied for a general manager position. He saw a position description at this time but denies that the position description dated July 2020 was the document he saw - based on some details included in the July 2020 document. Converge did not lead any evidence that established which position description was provided to Mr Hughes in 2020.

[41] At the hearing Converge tried to rely on Mr Hughes' written job application for the general manager position, dated August 2020 but I did not give Converge leave to rely on this document because (1) the job application document did not shed any light on which position description had been provided to Mr Hughes in 2020, (2) the job application contained a raft of other material in which, unsurprisingly, Mr Hughes talked up his skills, experience and strategic acumen and (3) to admit the evidence at such a late stage of the hearing was likely to open up another round of filed written evidence and a further hearing date in circumstances where Converge had already been given a fair opportunity to prepare and present its case. Neither Mr Gretton-Watson nor Ms Nicholson had any direct knowledge of the July 2020 document.

[42] At the hearing Mr Gretton-Watson gave evidence that the July 2020 position description was provided to him in the course of the preparation of his evidence for these proceedings in 2023. He said that he was told by somebody else that the document was found in Mr Hughes' OneDrive folder – being an electronic folder of files in which Mr Hughes stored documents during his employment.

[43] Both position descriptions in evidence contained errors. Both documents indicate that Mr Hughes' position reports to the "Chief Customer Officer", which is a defunct position.

[44] There is no evidence about who drafted the two positions descriptions, and the draftsperson was not under any requirement to be exactly correct about the contents of the document. Many position descriptions contain vague, aspirational descriptors that have little connection to the work performed or the responsibilities attached to the position said to be described. The two position descriptions in evidence are no different. For example, in the "job purpose/primary objective" section of the February 2023 position description it says:

"The Purpose of this role is to build, develop and lead a team of highly engaged, high performing sales people to manage all the business & enterprise customers for the organisation in order to create the highest level of advocacy, grow new and retain existing customers, and in turn exceed a collective revenue objective of \$20m per annum (annual budget), along with the individual revenue and profit targets across all of the Converge product portfolios.

These outcomes will be achieved through setting a strong team dynamic and a culture of collaboration and success, strategic planning for both the sector and all individual business partners, the regular and ongoing coaching and development of a team of sales leaders to optimise their capability, and strongly managing performance of the team against all performance KPIs.

The role also plays a key function as a member of both the Customer Leadership Team as well as the Business Leadership Team of Converge, and so success will therefore also come from leadership to Converge as an organisation, very strong cross business engagement and alignment, and successfully representing requirements of the business (strategic and operational) to achieve not only the customer business results, but also those of the broader business."

[45] Mr Gretton-Watson's and Ms Nicholson's witness statements both describe what they observed and regarded to be the functions performed by Mr Hughes in his role. Both witnesses said they prepared their evidence about Mr Hughes' duties and responsibilities by reference to the February 2023 position description.

[46] In my view this case is not won or lost on the strength of the position description documents. Position descriptions generally, and the two position descriptions in evidence specifically, are not contractual documents. Whilst they record the employer's expectations for the holder of the relevant position, they do not record the rights and obligations of the parties.

[47] I have instead relied upon the direct evidence given by the witnesses regarding Mr Hughes' actual duties and responsibilities.

The Principal Purpose of Mr Hughes' employment

[48] In my view the primary purpose of Mr Hughes' employment was to perform customer relationship management functions.

[49] In Mr Hughes' work team there were seven or eight customer relationship managers. Mr Hughes' August 2022 performance review records Mr Hughes' closed sales figures over 12 months to be approximately 1/8 of the total closed sales for the work team. The same document records Mr Hughes as holding the "fourth largest portfolio of all CRMs."

[50] Three of the top six revenue customers across the whole organisation were in Mr Hughes' personal portfolio. Mr Hughes spent approximately two hours per day every day dealing with one particular client.

[51] These matters strongly suggests that Mr Hughes' position was more closely aligned with the Customer Relationship Managers than it was with Converge's senior management.

[52] There was a dispute in the evidence about whether Mr Hughes had authority to make decisions about hiring and firing of staff.

[53] Ms Nicholson said that Mr Hughes was "responsible for key decision-making around recruitment/selection and termination of direct reports within his portfolio." Mr Gretton-Watson said that Mr Hughes was "instrumental [in] employing and managing his team" and that he "built over time a national team of CRMs reporting to him who were trained specifically to support [Converge's customer base]."

[54] Mr Hughes was clear in his evidence that his involvement in the recruitment of new staff was limited. He said he was involved in first round interviews in the preparation of shortlists for second interviews. He did not attend second interviews and, he said, was not consulted about or involved in the final hiring decision. Similarly, Mr Hughes said he provided input to others about dismissing staff but did not have any authority to make final decisions.

[55] I am inclined to more readily accept Mr Hughes' account of these matters. Mr Hughes, Mr Gretton-Watson and Ms Nicholson are experienced salespeople and tender-writers. When one cuts through the elaborate descriptors to consider Mr Hughes' role in these matters, it is clear that Mr Hughes did not have any tangible authority in relation to employment and dismissal.

[56] It is agreed by all witnesses that Mr Hughes managed the Senior Client Relationship Managers and also the Client Relationship Managers but it could not be said that the principal purpose of Mr Hughes' employment was managerial in nature (see *Carpenter* at [9]).

[57] Mr Hughes met each morning with Mr Gretton-Watson. Mr Gretton-Watson said they often discussed strategic matters and confidential information. Mr Hughes said that once or twice per fortnight information was discussed that could be described as strategic or highly confidential. Whilst there are assertions in Converge's evidence of Mr Hughes being involved in matters of strategy, there was very little evidence of substance about such matters.

[58] There was evidence of Mr Hughes making suggestions from time to time that were considered and then implemented by those more senior than him, which is not actually indicative of Mr Hughes having any authority to make decisions affecting Converge’s corporate strategies, nor is it indicative of Mr Hughes participating in strategic ‘whole of company’ discussions. Similarly there were assertions that Mr Hughes was engaged to “drive” strategies or “set” a desired culture within his team, however there was no evidence of Mr Hughes doing any more than implementing Converge’s strategies.

[59] Mr Hughes was probably very strategic in how he performed his job. He was a well-paid manager who presumably went about his job strategically. He probably developed strategies for doing his duties in the most effective way possible and probably coached and developed his subordinates to perform their job and deal with their own clients in a strategic way. Performing his duties in a strategic manner is not the same thing as participating in strategic whole of company discussions or setting or contributing to the setting of corporate strategies.

[60] Mr Hughes’ performance appraisal in August 2022 records Mr Gretton-Watson’s assessment of Mr Hughes’ performance by reference to the matters Mr Gretton-Watson thought to be important. Mr Gretton-Watson’s comments refer to both CRM functions and also management functions.

[61] Converge called in aid the observation of Commissioner McKinnon in *Hobart District Nursing Service Inc* [\[2018\] FWC 4818](#) at [70] that roles such as General Manager did not “sit comfortably” within the classification structure of the Health Award. The reference to “General Manager” in Mr Hughes’ job title is indicative of seniority however this reference seems more for the purpose of distinguishing Mr Hughes from the “managers” he supervises, or in the words of Deputy President Gostencnik in *Kaufmann*, “a rank or accolade accorded by the Respondent.” He reported to the “Executive Director of Customer Relationships” which is an even higher rank or accolade. As DP Gostencnik also said “the question of award coverage is not determined by the person’s title – it is the duties performed that will be of significance.”

[62] In my view the two most telling factors are (1) that his individual revenue figures were equivalent to the other CRMs, insofar as he was 1 of 8 in his team doing CRM work and his revenue was one eighth of the team’s revenue, and (2) a significant portion of his days, weeks and months were spent doing purely CRM work.

[63] As the authorities make clear, I do not need to make findings about how much time was spent performing different duties. Instead I need to make findings about the nature of the work and the circumstances in which it was performed.

[64] On balance I find that the principal purpose for which Mr Hughes was employed was to perform work a client relationship management nature.

Health Professionals and Support Services Award 2020

[65] The Health Award applies to employees of employers in the health industry “in the classifications listed in Schedule A – Classification Definitions to the exclusion of any other modern award” (clause 4).

[66] The parties agree that Converge is an employer in the health industry and is covered by the Health Award.

[67] Schedule A – Classification Definitions is in two parts: Support Services Employees and Health Professional Employees. There are nine levels of support services employees in Schedule A. Mr Hughes argued that he was employed at highest level.

[68] Indicative roles across the range of Support Services employees in Schedule A include general clerk (Level 1), storeperson (Level 2), receptionist (Level 3), medical imaging administration (Level 4) and general clerical supervisor (Level 7).

[69] The indicative typical duties and skills for Support Services Employee Level 8 are:

- “(i) operating and having responsibility for a complex and diverse payroll system;
- (ii) applying detailed knowledge of the organisation’s objectives, performance, projected areas of growth, product trends and general industry conditions for the purposes of assisting in developing policy or new products and services to meet changing market needs or other circumstances;
- (iii) using computer software packages including evaluating and determining optimum software solutions or the integration of complex word processing/data/graphics text;
- (iv) finalising quotations or costings by applying a detailed knowledge of variable inputs, margins, market conditions, supply and delivery arrangements; or
- (v) preparing internal reports for management in any or all of the following areas:
 - account/financial;
 - staffing;
 - legislative requirement; and
 - other significant company activities/operations.

[70] Support Services Employee Level 9 is defined as follows:

“A.1.9 Support Services employee—level 9

(a) Work at this level is usually performed in relation to established priorities, task methodology and work practices to achieve results in line with the organisation goals.

(b) The work may include preparing papers and reports, drafting complex correspondence for senior employees, undertaking activities of a specialist or detailed nature, assisting in the preparation of procedural guidelines, providing, interpreting and analysing information for clients or other interested parties, exercising specific process responsibilities, and overseeing and co-ordinating the work of subordinate staff.

(c) Work at this level includes supervision of a work group, small work area or office within the total organisational structure and co-ordination of a range of organisation functions.

(d) Work is performed under general direction as to work priorities and may be of a technical or professional, project, procedural or processing nature, or a combination of these.

(e) Direction exercised over work performed at this level may be less direct than at lower levels and is usually related to task methodologies and work practices. Employees at this level are expected to set priorities and to monitor work flow in the area of responsibility.

(f) The work at this level requires the application of knowledge usually gained through previous experience in the discipline or from post secondary or tertiary study. The work may require the co-ordination of a range of organisation functions and the exercising of judgment and/or delegated authority in areas where precedents or procedures are not clearly defined.

(g) Independent action may be exercised at this level, e.g. developing procedures, management strategies and guidelines.

(h) Indicative typical duties and skills at this level may include:

(i) supervising staff, setting priorities, monitoring work flow, and the development of strategies or work practices;

(ii) having responsibility for the development of appropriate training programmes related to group development;

(iii) applying equal employment opportunity and industrial relations principles;

(iv) providing advice in relation to personal and career development related to work requirements;

(v) liaising or communicating with clients or other interested groups;

(vi) general knowledge of the organisation's operations, combined with specialist knowledge of major activities within the work area; or

(vii) being able to investigate interpret or evaluate information where legislation, regulations, instructions or procedural guidelines do not give adequate or specific answers."

[71] The highest pay point in the support services stream is currently \$35.04 per hour – which equates to a full-time base annual wage of \$69,239. Mr Hughes' base salary was almost 2.5 times larger than the top award pay point. I note parenthetically that the highest pay point in the Health Professionals stream of the Award is currently \$2,404.90 per week (\$125,054.80 per annum).

[72] Clause 22.1 of the Health Award allows for annualised wages by written agreement for support services employees at level 8 or level 9 and certain health professional employees.

[73] As the Full Bench in *Zheng* observed at [45], trying to determine whether the principal purpose of an employee’s employment fits within a generically defined classification structure is likely to produce difficulty in rendering a clear answer:

“It is to be noted that the “principal purpose” test was utilised in *Carpenter* to determine whether the employee in question fell within the incidence of the relevant award, which was described in terms of the specific work function of the employee, and not to determine whether the employee fell within a particular classification in the award. It appears to us, however, that the “principal purpose” test is singularly ill-suited to determine whether a person falls within one of the classifications in the PE Award (or indeed the IT Award). That is because the classifications, including but not limited to the Level 3 classification considered in Ms *Zheng*’s case, are expressed in highly generic terms and do not describe with any specificity the job functions required to be performed at each level. It appears to us that the classification descriptors have been drafted primarily in order to determine, by reference to the degree of skill and responsibility being exercised, in which classification a person otherwise covered by the award will fall, rather than to identify whether a person is covered by the award at all. In respect of Level 3, for example, the classification descriptor begins by referring to “An employee at this level ...”, and the subsequent criteria do not describe any function particular to the job of an engineer, IT specialist or scientist but merely uses broad expressions such as “mature professional knowledge”, “scope for individual accomplishment”, “coordination of more difficult assignments” and “modify established guides and devise new approaches”. The only language which appears to attach to work which might be performed by an engineer, IT specialist or scientist are the words “professional” and “technical”, but these are used only in the most general way. We consider that the main function of the Level 3 descriptor is to distinguish that classification from the other classifications above and below it. Identifying the “principal purpose” of an employee’s employment and then attempting to determine whether that purpose fits within such a generically defined classification descriptor seems to us to be an inchoate task likely to produce difficulty in rendering a clear answer.”

[74] Mr Hughes performed duties that could be described using some of the terms in the definition of Support Services Employee Level 9, such as:

- (a) preparing papers and reports;
- (b) drafting complex correspondence for senior employees;
- (c) providing, interpreting and analysing information for clients and other interested parties;
- (d) supervising staff, setting priorities, monitoring work flow, and the development of strategies or work practices; and
- (e) being able to investigate interpret or evaluate information where legislation, regulations, instructions or procedural guidelines do not give adequate or specific answers.

[75] Mr Hughes performed duties that fit within some of the indicative duties and skills for Support Services Employee Level 8, specifically:

- (a) applying detailed knowledge of the organisation's objectives, performance, projected areas of growth, product trends and general industry conditions for the purposes of assisting in developing policy or new products and services to meet changing market needs or other circumstances; and
- (b) finalising quotations or costings by applying a detailed knowledge of variable inputs, margins, market conditions, supply and delivery arrangements.

[76] Arguably the principal purpose of Mr Hughes' employment is to deploy his sales and client relationship skills, and arguably the only connection between Mr Hughes' work and the work of support services employees under the Health Award is that the product he happens to be selling (and that the clients happen to be using) are health services.

[77] There is only a passing reference in the classification definitions in the Award to developing new products and services to meet changing market needs or other circumstances (in Level 8).

[78] However in my view Mr Hughes' evidence of his direct dealings with clients regarding the services provided by Converge sufficiently established a link between his work and the work described in the classification definitions of the Award.

[79] One only needs to look again at the duties Mr Hughes said he performed on a daily basis to see the connection between his work and the work of support workers under the Health Award:

“Daily

- a. Up to 8 customer or internal meetings per day via Teams
- b. Review and respond to around 150 emails
- c. Video meetings via Teams and Telephone calls with customers typically between 6 and 10 per day on anything from discussing their new requirements, providing advice on mental health and wellbeing for their employees, follow up on actions
- d. Approx 1 to 2 hours per day dealing with [one particular client's] customer issues and enquiries
- e. Dealing with customer complaints via telephone and email
- f. Providing support and guidance to the team with their questions and queries.”

[80] For the above reasons I find that:

- (a) the principal purpose of Mr Hughes' employment is to perform customer relationship management work;
- (b) Mr Hughes was also responsible for managing other customer relationship managers;
- (c) Mr Hughes' duties and responsibilities fit within the classification definitions for Support Services Employee levels 8 and 9;
- (d) Mr Hughes is therefore covered by a modern award;
- (e) Mr Hughes has completed the minimum employment period;

- (f) Mr Hughes has met his onus to provide a sufficient evidentiary basis upon which the Commission can be satisfied that he is a person protected from unfair dismissal; and
- (g) Mr Hughes' unfair dismissal claim can continue.



DEPUTY PRESIDENT

Appearances:

P Mullaly for the Applicant

J Hooper of Counsel instructed by *B Drysdale* of Pointon Partners for the Respondent

Hearing details:

2023.

Sydney (By Video using Microsoft Teams)

September 15, 21.

Final written submissions:

Applicant: 2 October 2023

Respondent: 10 October 2023

Printed by authority of the Commonwealth Government Printer

<PR768286>